United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2041

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-2041

APPEAL

from the

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

LOUIS COFONE,

-APPELLANT,

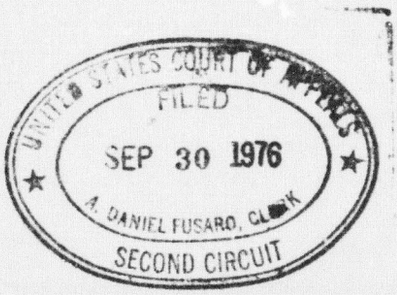
vs.

JOHN MANSON, Commissioner of Corrections, CARL ROBINSON, Warden of the Connecticut Correctional Institution at Somers,

-APPELLEES.

APPELLANT'S BRIEF

B P/S



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2. ARE THE DEPARTMENT OF CORRECTION, ADMINISTRATIVE REGULATIONS RELATING TO MAIL REVIEW IMPERMISSIBLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT RIGHTS OF THE INMATE?

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STATEMENT OF THE CASE

This is an appeal from an Order and Judgment, dated May 14, 1976, by Judge M. Joseph Blumenfeld of the United States District Court for the District of Connecticut. The Appellant filed his notice of appeal and motion to proceed in forma pauperis on appeal on April 17, 1976. The motion to proceed in forma pauperis was granted on that same day.

On November 18, 1974, Louis Cofone, an inmate at the Connecticut Correctional Institution at Somers, Connecticut filed an action pursuant to 42 U.S. Code §1983 challenging the policies and regulations promulgated by the Connecticut Department of Corrections for the screening of incoming publications and the review of inmate mail. In seeking declaratory and injunctive relief,[1/] the appellant alleged that the said practices and regulations infringed upon his First and Fifth Amendment rights to the United States Constitution.

Specifically, the appellant challenged in his pleadings and at the trial held on September 3, 1975, the constitutionality of Department of Corrections, Administrative Directive, Review of Reading Materials, Ch. 3.7, on the grounds that provisions of that regulation infringed upon

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1/ On March 17, 1976, Appellant filed an Amended Complaint withdrawing his claim for injunctive relief thus eliminating the need for a three-judge court.

his First Amendment rights and failed to provide him with due process safeguards. In addition, appellant sought an order to invalidate Department of Corrections, Administrative Regulations §§1-12 relating to mail review on First Amendment grounds of overbreadth and Fifth Amendment grounds of due process. Appellant challenged on similar grounds the prison official's right to open privileged communications between an attorney and an inmate outside of the presence of the inmate.

In an unreported opinion rendered on March 17, 1976, Cofone v. Manson, Civil No. H-74-367, the Court, per Blumenfeld, J., granted declaratory relief to the appellant in regard to his claims relating to the screening of publications. He thereafter denied and dismissed such relief on appellant's claims relating to the mail regulations. Appellant now seeks reversal of the District Court's ruling rejecting his constitutional challenge to Department of Corrections, Administrative Regulations §§1-12 relating to the review of inmate mail.

STATEMENT OF FACTS

The review of incoming and outgoing mail of inmates incarcerated at the Connecticut Correctional Institution at Somers is regulated by Department of Correction, Administrative Regulations §§1-12, 36 Conn.L.J. No. 33 February 11, 1975. These regulations provide that no social mail[2/] can be read by prison officials except upon the finding of certain criteria:

> Sec. 11. Review of Mail
>
> (a) Under exceptional circumstances the review of both incoming and outgoing mail may be authorized in writing by the warden. Authorization to review mail may be given on a finding by the warden that there are indications creating a reasonable belief that:
>
> 1. Correspondence concerns sending contraband in or out of the institution or contains contraband.
>
> 2. Correspondence concerns plans to escape.
>
> 3. Correspondence concerns plans for activities in violation of institutional rules.
>
> 4. Correspondence concerns plans for criminal activity to be conducted within the institution.
>
> 5. Correspondence itself is in violation of institutional rules.
>
> 6. Correspondence contains material which would cause emotional trauma to the inmate or provide some suggestion of inmate emotional state as a potential suicide case.

2/ Social mail is correspondence from non-privileged persons, (Transcript of Trial Proceedings) 63, 64 or those persons not included in section 5 of the regulations. See 36 Conn.L.J. No. 33 at 25. Since mail to and from "privileged" correspondents is prohibited from being read under the Department of Corrections regulations, this appeal is only concerned with non-privileged or "social" mail.

If any of the above circumstances are present, procedures are provided for an inmate to be placed upon a review list for a sixty-day period, renewable upon written application to the Commissioner of Correction:

> (b) The authorization to review mail shall be in writing by the warden and shall state:
>
> 1. The name of the inmate whose mail, both incoming and outgoing, may be reviewed.
>
> 2. The reason/s upon which the approval is based.
>
> 3. The time period for which review is approved.
>
> Authorization to review mail may extend for a period not to exceed 60 days, renewable only upon written application to the Commissioner of Correction.
>
> (c) On the last day of each month, each warden will provide the Commissioner of Correction with a list of names of those inmates whose mail is under review.

During the sixty-day period in which the inmate is on the review list, prison officials either review all of his incoming (T. 63)[3/] and outgoing (T. 66) social mail or all social mail from one party (T. 63).

At no time is the inmate notified that his name is placed upon this review list (T. 60), nor is he ever confronted with the information which furnishes the basis for placing him upon the list (T. 63). The person with whom he corresponds similarly is never given notice that the mail of the inmate is read by prison officials (T. 69).

3/ Transcript of Trial Proceedings, hereafter referred to as T.

Appellant was first placed upon this review list on August 29, 1974 after authorization was given by Warden Carl Robinson (T. 67). He remained on the list until his termination on December 18, 1974 (T. 67). The only reason for placement upon this review list was his involvement in efforts to organize groups within the institution (T. 68). During these four months, all Mr. Cofone's incoming mail was read by prison officials, including mail from his sponsor Ms. Evelyn Vine (T. 70). He was never notified except upon request that his mail was read, (T. 69) nor was any appeal body furnished so he could contest such a decision. No correspondent of Mr. Cofone's was given any notification that his mail was read by prison officials (T. 69).

On May 27, 1975, the appellant was placed on this review list for a second time (T. 66) during which all his incoming mail was read (T. 70). Again, while on this list Mr. Cofone was never notified that he was on this list, nor was he given an opportunity to contest this placement. Authorization was given to place him on the review list during this period because prison officials believed his correspondence contained escape plans (T. 61). Although no weapons or plans to escape were ever found in his cell, and although no attempts to escape were ever made by Mr. Cofone, his name was not removed from this list (T. 67). To the contrary, an extension of time in which to review appellant's mail was granted by Appellee Robinson on August 14, 1975 (T. 66,68).

ARGUMENT I.

PRISON REGULATIONS AUTHORIZING REVIEW OF PRISONER MAIL MUST MEET THE TEST ENUNCIATED BY THE UNITED STATES SUPREME COURT IN PROCUNIER V. MARTINEZ TO WITHSTAND CONSTITUTIONAL CHALLENGE.

Entry behind prison walls does not necessitate abandonment of all constitutional rights for an inmate. Paramount in the struggle to maintain some semblance of ordinary citizenship is the inmate's retention of the right to freedom of speech and press guaranteed by the First Amendment to the United States Constitution. Pell v. Procunier, 417 U.S. 817, 822 (1974);[4/] Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972); Aikens v. Jenkins, 534 F.2d 751, 755 (7th Cir. 1976); Finney v. Arkansas Board of Correction, 505 F.2d 194, 211 (8th Cir. 1974).

Correspondence by letter is one of the most significant manifestations of the exercise of this right. United States v. Ramsey, ___ F.2d ___ (D.C. Cir. Docket Nos. 75-1275, 75-1267, June 10, 1976, slip opinion at 9). As Justice Oliver Wendall Holmes has made clear, "the use of the mails is almost as much a part of free speech as the right to use our tongues...," United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921)(Holmes,J. dissenting), quoted with approval in Blount v. Rizzi, 400

4/ In Pell v. Procunier, supra at 822, the court finally erased any doubt that the First Amendment was applicable to prisoners: [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.

U.S. 410, 416 (1971) and United States v. Van Leeuwen, 397 U.S. 249 (1970).

Because an inmate is incarcerated, he does not surrender this right to communicate through written messages. Morgan v. Lavallee, 526 F.2d 221, 225 (2d Cir. 1975); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Stone v. Schmidt, 398 F. Supp. 768, 773 (W.D. Wis. 1975). His interest in communicating with family and friends through the mail is indeed exacerbated because of the confinement status in which he resides:

> Letter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation.
>
> Palmigiano v. Travisono, 317 F. Supp. 776, 786 (D.R.I. 1970) accord, Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971) cert. denied sub. nom. Oswald v. Sostre, 405 U.S. 978 (1972).

Absent the use of the mails, a prisoner's contact with those outside the correctional facility is minimal.

Courts have been reluctant to allow prison officials the unrestricted authority to impede a prisoner's access to free and unhindered communication because infringement upon this right results in such extreme injury to an inmate. 5/

5/ In fact, court abstention is considered as extremely inappropriate when these fundamental rights are curtailed by prison officials. See Procunier v. Martinez, 416 U.S. 396, 405-406 (1974); Martin v. Wainwright, 525 F.2d 983 (5th Cir. 1976).

In the leading case of Procunier v. Martinez, 416 U.S. 396, 408 (1974), the United States Supreme Court explicitly warned that "the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication." See also Pell v. Procunier, supra; Battle v. Anderson, 376 F. Supp. 402 (E.D. Okl. 1974); Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

A prisoner's rights relating to mail use are not of course without limitations, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971), Paka v. Manson, 387 F. Supp. 111 (D. Conn. 1974), but such restrictions are necessarily reduced to the minimum by First Amendment considerations. When governmental interference results in withholding of a particular letter or deletion of portions of that letter by a prison offical, such conduct is tolerable only if the following two-pronged test is met:

> First, the regulation or practice authorizing mail censorship must further an important or substantial governmental interest unrelated to the suppression of expression... Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.
>
> Procunier v. Martinez, supra at 413.

See also, Wolff v. McDonnell, 418 U.S. 539, 577 (1974); Morgan v. LaVallee, supra at 225.

But, despite the fact that prison regulations can be promulgated restricting an inmate's use of the mails in certain well-delineated situations, correspondence by an inmate with a person on the outside remains a constitutional right, and not a privilege to be easily subverted by prison officials. Procunier, supra at 423 (Marshall, J. concurring).

The Department of Corrections for the State of Connecticut has issued regulations infringing upon an inmate's right to communicate freely through the use of the mails without obstructions.[6/] Although section 2 of the regulations indicates that incoming and outgoing mail of an inmate will not be read by the administration, section 11 provides the necessary exceptions to that rule.[7/]

The appellant submits that in order for this regulation to withstand constitutional attack, it must be scrutinized under the test set forth in Procunier v. Martinez, supra at 413.

In Procunier, the issue was total censorship and not the review of mail, which is the central issue in this case.[8/]

6/ Department of Correction, Administrative Regulations §§ I-12, 36 Conn. L.J. No. 33 (February 11, 1975)

7/ Id. at 25, 26.

8/ It is to be noted at the outset that "censorship" of mail includes withholding parts or all of the letter whereas "review" of mail indicates inspection and reading of the letter without denying access to it (T. 64).

The Court held that mail could be kept from an inmate only under a regulation tailored to protect the security, and order of the prison, and the rehabilitation of the inmates. Procunier, supra, at 413. In reaching this conclusion, the Court entertained a balancing test between the interests espoused by the prison for withholding the mail and the First Amendment rights of the inmate in receiving the correspondence. The Court did approve of some restrictions permitting censorship, but ruled that such regulations were to be no greater than necessary to insure the prison's interest. Procunier, supra at 414.

Although the regulation in question involves the authority of a prison official to open and read inmate mail, the injury suffered by the inmate when this occurs is clearly equal to the injury sustained by total censorship, and so the same balancing test must apply before any regulations are promulgated which restrict this right.[9/]

The mere knowledge by an inmate that his mail can be read by prison officials greatly inhibits the exercise of his First Amendment right to free speech. He may be wary of placing intimate thoughts in letters which could intensify his sense of isolation and alienation, undermining any

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9/ Although the majority opinion in Procunier reserved this issue explicitly, Justice Marshall in a concurring opinion joined by Justice Brennan and Justice Douglas agreed that an inmate's First Amendment rights "may be seriously infringed by permitting correctional authorities to read all prisoner correspondence." Procunier, supra at 423. (Marshall, J. concurring).

rehabilitative goal.[10] Prison authorities would be able to identify the inmate as the author or recipient of ideas of which they disapprove,[11] and the inmate could be subjected to official reprisal as a result. Because such tension exists between an inmate's significant interest in the right of unhindered communication and the prison's interest in reading the correspondence, any restriction imposed "to warrant such limitations upon an individual inmate's rights to communicate" must occur only upon "a showing of a substantial governmental interest serving the needs and exigencies of the institutional environment." Morgan v. LaVallee, 526 F.2d 221, 225 (2d Cir. 1975).

This Circuit did have occasion to consider whether prison officials could arbitrarily open and read all incoming and outgoing mail of an inmate. Sostre v. McGinnis, supra. In agreeing that mail could not be censored absent a showing of threat to the security and order of the institution, the court ruled that mail to and from prisoners could always be read and opened. Sostre, supra at 201. The District Court below, quoting Sostre, agreed that prison officials could open and read prisoners' mail at random, and failed to recognize the inmate's First Amendment right to prohibition of this practice.[12]

10/ "Prisoner Mail Censorship and the First Amendment," 81 Yale L.J. 87, 97 n. 66 (1971).

11/ Id. at 100 n. 83.

12/ Cofone v. Manson, Civ. No. H-74-367, March 17, 1976,

The appellant submits that the holding of Procunier undermines the rationale in Sostre, supra and the District Court's ruling, and mandates the reexamination of these opinions.[13/] In Procunier, supra, Justice Powell in writing for the majority, specifically held that "any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests" of security, order, and rehabilitation. 416 U.S. at 414. (emphasis added). See also Aikens v. Jenkins, supra; Stone v. Schmidt, supra. Since the practice of opening and reading an inmate's mail certainly places restrictions upon the inmate's right to free and uninhibited correspondence, any regulation approving of such a practice must be tested by the standards enunciated in Procunier.

Slip Op. at 19. The District Court held that the appellant conceded this issue. Appellant continually urged in his Complaint, Amended Complaint, Brief, Supplemental Brief, and Reply Brief that reading of prisoner mail was restricted by the First Amendment, and the Court's conclusion was erroneous.

13/ In Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974), the court acknowledged that outgoing mail could be read where necessary, but remanded for the District Court to review the proposed regulations in light of Procunier v. Martinez. See also Morgan v. Montanye, 521 F.2d 693 (2d Cir. 1975) (Oakes, J., Memorandum Opinion dissenting from denial of rehearing en banc) cert. denied ___ U.S. ___ (1976). Even in the majority opinion of that case, 516 F.2d 1367, 1372 (2d Cir. 1975) this Court interpreted Sostre to permit the opening and reading of prisoner mail but only in the interest of security.

ARGUMENT II.

CONNECTICUT DEPARTMENT OF CORRECTION ADMINISTRATIVE REGULATIONS RELATING TO MAIL ARE IMPERMISSIBLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Placement of Appellant's Name Upon a Review List During Which Time All His Incoming and Outgoing Mail is Read Violates the Procunier Standards.

The Connecticut Department of Correction in Section 11(b)(3) of the Administrative Regulations relating to mail, have authorized the practice where prison officials can place an inmate's name upon a "review list" if they have "indications creating a reasonable belief" that correspondence of an inmate contains plans to escape, contraband, material which would cause emotional trauma to the inmate.[14/] This authorization may extend for a period of sixty days renewable upon application to the Commissioner of Correction.[15/] During the time when the inmate is placed upon this list, all of his incoming and outgoing mail is read (T. 63,64).

The appellant challenges this provision on the ground that it is not narrowly drawn to protect the inmate's interest in freedom from governmental interference with his First Amendment right to use the mails.[16/] Before any deprivation

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14/ Department of Correction, Administrative Regulations §§1-12, 36 Conn.L.J. No. 33 (Feb. 11, 1975) at 26.

15/ Id.

16/ The Court below, although Appellant argued such a proposition in all his pleadings, did not even reach this issue since it held that prison officials could open and read all inmate mail at random. See Cofone v. Manson, Civil No. H-74 367, Slip Op. at 19.

of an inmate's First Amendment right to free and unhindered communication can occur, there must be a substantial governmental interest which supersedes this First Amendment right. Not only is the burden of proof upon the prison officials to demonstrate this unequivocal need for such a restriction, but the burden of proof also rests upon these administrators to show that the regulation imposed is no greater than necessary to further the particular governmental interest at stake. Procunier, supra at 413. "Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity." Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); NAACP v. Button, 371 U.S. 415, 433 (1963). Even if the regulation furthers a governmental interest of penal administration, it "will nevertheless be invalid if its sweep is unnecessarily broad." Procunier, supra, at 414. This regulation in the case at bar clearly falls into that sweeping category.

Although a prison official may have a reasonable belief that correspondence to and from a particular outsider may contain contraband or escape plans, to claim that all other of the inmate's mail similarly contains such prohibited material is to engage in mere speculation.[17/] Under the

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17/ In the instant case, appellant was placed upon the review list from August 29, 1974 until December 18, 1974 because there were efforts by him to organize groups within the institution (T. 68). From May 27, 1975 up to and including the date of the trial, September 3, 1975 he was again placed on the review list because prison officials feared his

present regulation, however, no distinction is made between those pieces of correspondence which might contain proscribed material and those letters containing ordinary harmless exchange of information.

An analogy can be drawn between the screening of mail for review, and the screening of publications. Although the prison administrators had a policy where an inmate was required to assemble several issues of a publication in order to have it "approved", the Court below invalidated this practice as violative of the First Amendment:

> As I stated above, the presumption of acceptability attaches to each issue, and the burden is on the prison administration to justify the rejection of each issue as it is received. A political, social or philosophical bias on the part of the editors, be it pro-union, pro-racial separation, or anti-behavioral modification cannot justify an outright and total ban on a publication unless the offending issue contains material which actually poses a specific threat, of some immediacy, to the order and security of the institution. (emphasis added) Cofone v. Manson, Slip Op. at 16.

See also Battle v. Anderson, supra at 426; Fortune Society v. McGinnis, supra at 901. Thus, just as each periodical is presumptively entitled to admission, so should each piece of mail be entitled to the same presumption.

The appellant does not argue that inmate mail can never be opened or read. He does submit, however, that a regulation which allows blanket approval for all mail to be

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correspondence contained plans to escape (T. 67). Placement upon this list resulted in the reading of all appellant's incoming mail including mail from his sponsor, Ms. Evelyn Vine (T. 70).

read for a period of 60 days, is impermissibly overbroad. A regulation that calls for an individual assessment of each piece of correspondence before reading can occur is only adequate to insure that the inmate's First Amendment rights will not be unduly infringed upon.

B. Criteria in the Department of Correction Administrative Regulations Relating to Mail Which Authorize Review of Inmate Mail Place an Impermissible Restraint Upon First Amendment Rights.

Since the test enunciated in Procunier applies to any prison regulation restricting an inmate's First Amendment right to use of the mails, the burden is upon the prison officials to demonstrate that each provision contained in the Administrative Regulations relating to mail review furthers a substantial governmental interest which outweighs the inmate's First Amendment rights. Procunier, supra at 413; Worley v. Bounds, 335 F. Supp. 115 (W.D.N.C. 1973); Palmigiano v. Travisano, 317 F. Supp. 776 (D.R.I. 1970).

The appellant submits that Section 11(a)(1) of the regulations permitting officials to place an inmate upon a review list and read all his mail because his correspondence may contain contraband is impermissibly overbroad.[18/] "Contraband" is not defined and thus, prison officials have

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18/ Although appellant did not challenge this specific criterion of this regulation in the court below, he did challenge the entire regulation as an infringement of his First Amendment rights. Moreover, the District Court, Blumenfeld, J. held that the regulations and practices of the prison officials were properly "tailored" or restricted. Cofone v. Manson, Slip Op. at p. 20.

unlimited power to determine what this may include under the regulation. In addition, to curb the introduction of contraband into the institution may justify inspection of incoming mail, but "this argument provides no justification for reading outgoing mail." Procunier, supra at 424 (Marshall, J. concurring). Furthermore, if there exists a "reasonable belief" that the correspondence contains contraband, inspecting the letter by means of fluroscopic devices or hand manipulation should suffice.[19/]

Section 11(a)(6) of the regulations, which provide for an inmate to be placed upon a review list if prison officials have a reasonable belief that the correspondence of the inmate "contains material which would cause emotional trauma to the inmate or provide some suggestion of inmate emotional state as a potential suicide case" also fails under the First Amendment's prohibition against overbreadth.

No where in the regulation is "emotional trauma" defined nor are there any guidelines for determining when the correspondence "provides some suggestion of inmate emotional state as a potential suicide case." Because there are many

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19/ In fact, the Connecticut Correctional Institution at Somers did employ a fluroscopic device to screen correspondence for contraband (T. 26). Such practice was discontinued, however, only because of the expense involved, and not because such device was ineffective (T. 26). But lack of resources do not provide a justifiable excuse for discontinuance of such a practice. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Rhem v. Malcolm, 507 F.2d 333, 341 n. 20 (2d Cir. 1974)

divisive opinions even among psychiatrists and psychologists as to what "emotional trauma" may be or when it gives rise to suicide, this criterion gives unfettered discretion to the prison official to place an inmate upon this list and read all his mail.[20/]

In Procunier, supra at 415, the Court invalidated prison regulations which "invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." By allowing this portion of the regulation to remain, the risk that such subjectivity by prison officials will occur is clear.

20/ In Procunier, supra, at 415 n. 15, the Court approved a regulation censoring an inmate's incoming mail if it would cause emotional disturbance to the inmate, but this determination, according to the regulation, was required to be made by a member of the institution's psychiatric staff after consultation with the inmate's caseworker.

C. Opening and Reading of Inmate Mail by Prison Officials Outside of the Inmate's Presence Infringes Upon His First Amendment Rights.

Not only are the Department of Correction Administrative Regulations relating to mail constitutionally suspect on their face but are also in violation of the First Amendment in their application.

Pursuant to these Administrative Regulations, an inmate's incoming and outgoing mail is read outside of his presence without any notification to him that such practice is occurring (T. 60).

Even if the reading of mail is justified under the Procunier test, or the criteria set forth in the Department's own mail regulations, no substantial governmental interest exists in refusing to acknowledge that the inmate has been placed upon a review list, and by refusing to allow the inmate to be present at the time his mail is read.[21/]

Although the state obviously has an interest in the rehabilitation of the inmate, no actions by prison officials could damage the emotional state of an inmate more than if

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21/ In Wolff v. McDonnell, supra, the United States Supreme Court sanctioned a practice of opening and inspecting attorney-client mail in the presence of the inmate. In that case, the Court held this was "all, and perhaps even more, than the Constitution requires" but only because such mail was inspected but not read. Wolff, supra at 577. See also, Finney v. Arkansas Board of Correction, supra at 211 where the Eighth Circuit indicated that "opening mail in the inmate's presence is never objectionable," and Gates v. Collier, 501 F.2d 1291, 1310 (5th Cir. 1974).

the inmate was constantly afraid that his mail was being read by those officials. As the Court in Procunier, supra at 412 acknowledged, "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."

In Guajardo v. McAdams, 349 F. Supp. 211, 219 (S.D. Texas 1972), cert. denied 416 U.S. 992, the court thoroughly balanced "the institutional needs for safety and orderly prison administration against the emotional release derived by the inmates from expressing by mail their complaints to others or communicating with others, as well as the therapeutic and rehabilitative values coupled with First Amendment freedoms," and concluded that the prisoner "should be present for any inspection of his mail."[22/] See also Lamar v. Kern, 349 F. Supp. 222 (S.D. Texas 1972).

What greater anomaly exists than to allow inmates unmonitored visits with family and friends where escape plans could easily be discussed and emotional trauma could be increased, and not allow them to be present when their mail is read. Thus, appellant urges this Court to adopt a similar analysis as did the Court in Guajardo, supra, and invalidate the policy by the Department of Corrections of reading an inmate's mail outside of his presence.

22/ In Preston v. Cowan, 369 F. Supp. 14 (W.D.Ky. 1973), aff'd. in part, 506 F.2d 291 (6th Cir. 1974) the Court went further in holding that outgoing mail should not be inspected or read. Boston U. Law School Center for Criminal Justice, Model Rules and Regulations on Prisoner's Rights and Responsibilities (1973), Rule IC-2b suggested no incoming letters should be read except upon a showing of probable cause and obtaining a warrant from a court of law.

ARGUMENT III.

CONNECTICUT DEPARTMENT OF CORRECTION ADMINISTRATIVE REGULATIONS RELATING TO MAIL FAIL TO PROVIDE DUE PROCESS SAFEGUARDS IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Department of Correction, Administrative Regulations §§1-12 relating to inmate mail fail to provide any due process safeguards necessary to protect an inmate's First Amendment rights. There are no provisions for notification to either the inmate or the person with whom he is communicating to inform him that the mail is being read by prison officials. (T.,p.60,69).[23] When an inmate is placed on a review list for sixty days pursuant to the regulations, at no time is he given an opportunity to contest such a decision nor is he provided with any body to which he can appeal the prison administrator's decision.

When censorship of mail occurs, there must be certain procedural safeguards furnished:

> The District Court required that an inmate be notified of the rejection of a letter written by or addressed to him, that the

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23/ The appellant relies here upon his own due process rights, but it should be noted that the person with whom he is corresponding also has an interest in seeing that he receives notice of the infringement of his First Amendment rights. See Procunier, supra, at 418; Cofone v. Manson, slip op. at 15.

> author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence. These requirements do not appear unduly burdensome.
>
> Procunier, supra at 418,419.

See also Hopkins v. Collins, 411 F.Supp. 831,840 (D.Md. 1975); The Luparer v. Stoneman, 382 F.Supp. 495,502 (D.Vt. 1974). Because the reading of an inmate's mail results in an equally egregious infringement upon the inmate's First Amendment rights, governmental interference short of censorship requires no less.

The Court below, in denying appellant's due process claim, based its reasoning upon the fact that appellant had no expectation of privacy, and the state regulation provided notice to the general inmate population of the prison administration's right to open and read inmate mail under special circumstances. Cofone v. Manson, slip op. at 19.

Although it may be true that an inmate lacks any protection from intrusion into his cell by prison officials, he still has an expectation of privacy in regard to his communications:

> .....The prisoners' First Amendment rights are not violated by inspection of their mail for contraband, so long

> as the mail is not read and the inspection is done in the prisoner's presence so that he can be assured that the privacy of his communications is not breached.
>
> Wolff v. McDonnell, supra, at 601 (Douglas, J. dissenting).

Thus, this explanation by the Court below offers no justification for failing to require due process safeguards.

Moreover, a general notice to all inmates that prison officials have the right to open and read their mail at some unspecified time in the future when they are placed upon a review list is certainly not sufficient notification under Procunier. The inmate is never told for how long a period his mail is read, whether authorization for review of his mail is extended, what protections he is afforded if after reading the letter the prison official decides to withhold the correspondence.

In addition to the absence of any provision for notice, there necessarily are no provisions for the inmate to contest the placement of his name upon the review list, or to appeal the administrator's decision to place him upon such a list. In the instant case, appellant was finally informed, upon his request, that his name was on a review list (T.,p.69)

because prison officials had information that he was planning an escape. (T.,p.67).[24] Although prison officials admittedly found no escape plans in his cell, and although he made no attempts to escape, (T., p.67), because the regulations failed to provide either an opportunity to challenge this decision or an appeal body to address his complaint, appellant remained on the review list without any available remedy.

In weighing the inmate's interest in free and unhindered communication against the small inconvenience the implementation of such procedural safeguards would impose, it is clear that appellant's position must prevail. See Burke v. Levi, 391 F.Supp. 186, 191 (E.D. Va. 1975). Without such procedural due process safeguards guaranteed to an inmate under the Fifth and Fourteenth Amendments, his First Amendment rights do not receive adequate protection.

24/ The very fact that appellant was finally told his name was on a review list would undermine any argument by the prison officials that they had a compelling interest in preserving the secrecy of the identity of those they place upon the list.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Court to reverse the District Court's Judgment denying appellant's claims relating to the inspection and reading of inmate mail.

Respectfully submitted,

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Dated: September 14, 1976

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed, postage prepaid, to Mr. Stephen J. O'Neill, Assistant Attorney General, Department of Corrections, 340 Capitol Avenue, Hartford, Connecticut, this 14th day of September, 1976.

Martha Stone

Martha Stone